OCT 30 1992
OFFICE OF THE CLERK

(2)

No. 92-565

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BAGGEN TUG & BARGE CO., INC.
and
SAMSON TUG & BARGE CO., INC.,

Petitioners,

v.

RAINIER NATIONAL BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT RAINIER NATIONAL BANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES BRIAN STOETZER
Counsel of Record
1420 Fifth Avenue
Suite 4100
Seattle, WA 98101-2338
(206) 223-7000
Counsel for Respondent
Rainier National Bank

Michael B. King
Katherine Riffle Roper
1420 Fifth Avenue
Suite 4100
Seattle, WA 98101-2338
(206) 223-7000
Counsel for Respondent
Rainier National Bank

ABCD Legal Printers, Seattle, Washington

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Respondent respectfully suggests Petitioners' questions presented misstate the issues before this Court. The only issue actually presented by the petition is:

Whether a court sitting in admiralty may refuse to enforce an alleged oral agreement that violates a state integrated agreement (*parol* evidence) rule, when: (1) the parties contracted for the application of that state's law; (2) the state integrated agreement rule in question does not conflict with the general federal maritime law; and (3) the parties' contract is not within the traditional jurisdiction of the admiralty courts.

LIST OF PARTIES AND RULE 29.1 LIST

Respondent agrees with Petitioners' list, with the exception that Seattle-First National Bank, not Security Pacific National Bank, is successor to Rainier National Bank. Bank of America, in turn, is the parent of Seattle-First National Bank.

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties and Rule 29.1 List ii

Table of Contents iii

Table of Authorities vi

I. Statement of the Case 2

A. The Parties 2

B. The Facts 2

1. The Note and Mortgage 2

2. Purpose of the Note and Mortgage 5

3. The Trust Agreement Between Rainier and APC 7

4. Baggen's Subsequent Performance and Default 7

C. The Lower Court Proceedings 8

1. Before the District Court 8

2. Before the Court of Appeals . . . 10

II. Argument 11

A. The Petition Presents No Important Question of General Federal Maritime Law Requiring This Court's Review 11

1. The Ninth Circuit Properly Enforced an Express Contractual Choice of Law 11

2. The Ninth Circuit Properly Applied a State Law Rule That Is Consistent with the Comparable General Federal Maritime Rule 13

3. The Ninth Circuit Decision Does Not Concern a Contract Traditionally Within the Jurisdiction of the Admiralty Courts 15

B. The Petition Does Not Properly Present the Issues Petitioners Ask This Court to Review 16

1. Petitioners Did Not Timely Raise the Issues They Now Raise Before This Court 16

2. Petitioners' Present Theory Is Precluded by Its Proof Offered Below in Support of an Alternative and Factually Inconsistent Theory 18

3. Petitioner Did Not Timely Appeal From the Decree and Order of Sale 19

III. Conclusion 21

TABLE OF AUTHORITIES

CASES	PAGE
A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc., 852 F.2d 493 (9th Cir. 1988)	13
Babb v. Schmidt, 496 F.2d 957 (9th Cir. 1974)	17
Baltimore & Ohio R.R. Co. v. Alpha Portland Cement Co., 218 F.2d 207 (3d Cir. 1955)	19
Bank of California v. Starrett, 110 Wash. 231, 188 P. 410 (1920)	14
Blum v. Bacon, 457 U.S. 132 (1982)	19, 20
Browder v. Director, Dept. of Corrections, 434 U.S. 257 (1978)	20
California v. Taylor, 353 U.S. 553 (1957)	17
Carr v. FTC, 302 F.2d 688 (1st Cir. 1962)	17
Citibank, N.A. v. Data Lease Financial Corporation, 645 F.2d 333 (5th Cir. 1981)	20
Detroit Trust Co. v. Steamer THOMAS BARLUM, 293 U.S. 21 (1934)	15

Dietrich v. Key Bank, N.A., 693 F. Supp. 1112 (S.D. Fla. 1988) 12

Har-Win, Inc. v. Consolidated Grain & Barge Co., 794 F.2d 985 (5th Cir. 1986) 14

J. Ray McDermott & Co., Inc. v. Vessel MORNING STAR, 457 F.2d 815 (5th Cir.) (*en banc*), *cert. denied*, 409 U.S. 948 (1972) 15

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 9, 10, 11, 12, 13, 14, 15, 16

Meyer v. Armstrong, 49 Wash. 2d 598, 304 P.2d 710 (1956) 14

Palmer v. Reconstruction Finance Corp., 164 F.2d 466 (2d Cir. 1947), *cert. denied sub nom. New York, N.H. & H.R. Co. v. RFC*, 334 U.S. 811 (1948) 17

People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393 (1858) 15

Ray v. Law, 7 U.S. (3 Cranch) 179 (1805) 20

The TUNGUS v. Skovgaard, 358 U.S. 588 (1959) 16

U.S. for Use and Benefit of General Dynamics Corp. v. Home Indemnity Co., 489 F.2d 1004 (7th Cir. 1975) 19

U.S. v. Klotz, 503 F.2d 1056 (8th Cir. 1974) (*per curiam*) 17

Union Fish Co. v. Erickson, 248 U.S. 308 (1919) 9, 10, 11, 12, 16

Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2d Cir. 1948) 18

Whitman Realty & Inv. Co. v. Day, 161 Wash. 72, 296 P. 171 (1931) 14

STATUTES

28 U.S.C. § 1333 8

46 U.S.C. § 922(a) 5

46 U.S.C. § 922(b) 5

46 U.S.C. § 951 8

46 U.S.C. § 954(a) 8

46 U.S.C. § 31301 *et seq.* 2

Pub. L. 100-710 2

RULES

Supreme Court Rule 15.1 2

Supreme Court Rule 29.1 3

Federal Rule of Appellate Procedure 4(a) 20

MISCELLANEOUS

Restatement (Second) of Conflict of Laws § 187 12

Restatement (Second) of Trusts § 329 9

Anno., *Threat to Break a Contract as Duress*, 70 L. Ed. 822 (1926) 18

S. Friedell, 1 *Benedict on Admiralty* (6th ed. 1992) 12, 15

T. Schoenbaum, *Admiralty and Maritime Law* (3d ed. 1987) 14

J. Wigmore, 9 *Wigmore on Evidence* (Chadbourn rev. 1981) 13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BAGGEN TUG & BARGE CO., INC.
and
SAMSON TUG & BARGE CO., INC.,

Petitioners,

v.

RAINIER NATIONAL BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT RAINIER NATIONAL BANK'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Rainier National Bank ("Rainier") respectfully requests that this Court deny the Petition for a Writ of Certiorari, which seeks review of the Ninth Circuit's decision in this case, an unpublished disposition reported at 962 F.2d 14 (1992) (Table).

I.
STATEMENT OF THE CASE

Rainier preserves its rights under Rule 15.1 by addressing, in the following statement of the case, any factual misstatements made by Petitioners.

A. The Parties.

This is a mortgage foreclosure case, involving the foreclosure of a First Preferred Ship Mortgage under the Ship Mortgage Act of 1920.[1] Petitioners Baggen Tug & Barge Co., Inc. and Samson Tug & Barge Co., Inc. (collectively "Baggen") are jointly and severally liable under the mortgage and related instruments at issue. Rainier holds the mortgage and related instruments as trustee for Alaska Pulp Corporation ("APC"), who has never been made a party to the case.

B. The Facts.

1. The Note and Mortgage.

This case arises out of Baggen's default on obligations under a promissory note, secured by a First Preferred Ship Mortgage. On August 8, 1975, Baggen gave Rainier a one-page promissory note (the "1975 Note" or "Note").[2]

---

[1] In 1988, Congress repealed the Ship Mortgage Act of 1920, and passed a new law providing a revised statutory scheme governing mortgages on U.S. vessels. *See* Pub. L. 100-710 (effective January 1, 1989); *see also* 46 U.S.C. Ann. § 31301 *et seq.* (West Supp. 1992). The new act, however, made no changes material to this proceeding. Rainier therefore will continue to cite to the prior law, which may be found in the United States Code Annotated hardback volume containing 46 U.S.C. sections 721 to 1100.

[2] Complaint In Rem and In Personam to Foreclose Preferred Ship Mortgage ("Complaint"), CR 1, Ex. 1.

The Note was executed by George F. Baggen, as president of petitioners Baggen Tug & Barge and Samson Tug & Barge. These entities "jointly and severally" promised to pay to Rainier, "as Trustee, the principal sum of . . . $1,300,000. . . ." This sum was expressly stated to be "with interest thereon . . . at the rate of ten percent (10%) per annum until maturity." In the event of default in payment of "any part . . . or any interest," the outstanding principal sum "with accrued interest" at once became "due and collectible. . . ." The Note was "to be construed in all respects and enforced according to the laws of the State of Washington."

By its terms, the Note was an unqualified promise to pay -- Baggen's repayment obligation was not limited in any way to a particular source of funds (e.g., towing fees earned for services rendered to APC).

The Note was to be "secured by a First Preferred Ship Mortgage . . . executed and delivered by Baggen Tug & Barge Co., Inc., the owner of the . . . GEORGEANN. . . ." Accordingly (and also on August 8), a sixteen page First Preferred Ship Mortgage (the "Mortgage") was given by Baggen, to Rainier.[3] The Mortgage was between Baggen Tug & Barge Co., Inc. and Rainier, "as Trustee."[4] The Mortgage was given to secure Baggen Tug & Barge Co., Inc.'s payment of the Note, "both principal and

---

[3] Complaint, CR 1, Ex. 2.

[4] *Id.* at 1.

interest. . . ."[5] Under the Mortgage, Baggen "granted, conveyed, mortgaged, pledged, confirmed, assigned, transferred and set over . . . unto" Rainier "the whole of the vessel described as the Oil Screw GEORGEANN. . . ."[6] A failure to pay timely either principal or interest under the Note was expressly made an "events [sic] of default" under the Mortgage.[7]

In the event of default, Rainier was expressly granted the right to declare the balance of indebtedness under the Note -- principal and interest -- "due and payable immediately. . . ."[8] Rainier was also given the right to seize the GEORGEANN and sell it "in any manner permitted by law," if Baggen didn't "forthwith" pay that balance.[9] If sale proceeds were "insufficient to fully pay all expenses . . . and the principal and interest then remaining unpaid," Baggen would remain liable "for the amount of such deficiency."[10] The Mortgage expressly reflected the parties' intention that it qualify as a First Preferred Ship Mortgage under the Ship Mortgage Act of 1920.[11] Baggen does not dispute this

---

[5] *Id.*

[6] *Id.* at 3.

[7] *Id.* at 11.

[8] *Id.* at 12.

[9] *Id.* at 13.

[10] *Id.* at 13-14.

[11] *Id.* at 4, 11.

Mortgage was duly perfected as a First Preferred Ship Mortgage. *See generally,* 46 U.S.C. § 922(a), (b) (statutory perfection requirements).

Like the Note, nothing in the Mortgage in any way limited Baggen's repayment obligation to a particular source of funds.

2. Purpose of the Note and Mortgage.

The Note and Mortgage were part of a written agreement between Baggen and Alaska Pulp America, Inc. (now APC),[12] for financing the GEORGEANN's construction. On August 1, 1975, Baggen Tug & Barge Co., Inc., Samson Tug & Barge Co., Inc., and APC entered into an addendum (the "August 1975 Addendum")[13] to a prior loan agreement, dated December 1, 1974 (the "December 1974 Loan Agreement"). The August 1975 Addendum was executed by George Baggen, as president of Baggen Tug & Barge and Samson Tug & Barge. The August 1975 Addendum expressly recited that APC had loaned $1,300,000 to Samson Tug & Barge Co., Inc., under the parties' December 1974 Loan Agreement, and that Samson had used those monies to "construct and outfit a new steel tugboat . . . named GEORGEANN. . . ."[14] The December 1974 Loan Agreement had expressly provided that APC's loan (originally for $1,100,000, but subject to increase as needed)

---

[12] Alaska Pulp Corporation, or APC, is the successor in interest to Alaska Pulp America, Inc.

[13] Complaint, CR 1, Ex. 3.

[14] *Id.* at 1.

was to "be evidenced by a Promissory Note," and "bear interest at the rate of ten percent (10%) per annum. . . ."[15] In fact, George Baggen, as president of Samson Tug & Barge Co., Inc., executed a promissory note in that amount, "with interest thereon . . . at the rate of ten percent (10%) per annum. . . ."[16] This note, like the later August 1975 Note, provided for its "constru[ction] . . . and enforce[ment] according to the laws of the State of Washington."[17]

As of December 1974, the GEORGEANN was being built by Marine Power & Equipment Co., Inc., under specifications dated September 1, 1974. The vessel was not expected to be completed, outfitted and ready for delivery before March 31, 1975, and payments under the loan agreement were anticipated to be spread out from December 1, 1974 through March 31, 1975. Under the December 1974 Loan Agreement, upon the vessel's delivery Samson Tug & Barge Co., Inc., was to execute a First Preferred Ship Mortgage to APC's trustee, and give a new note, payable to that trustee. That is what happened, except Baggen Tug & Barge, not Samson Tug & Barge, gave the Mortgage and new note; APC agreed to change "on the condition Samson remain liable [on the $1,300,000 loan] . . .

---

[15] Petitioners' Amended Answer and Counterclaim ("Amended Answer"), CR 40, Ex. B at 2.

[16] *Id.* (copy of note).

[17] *Id.*

and co-sign as a maker [of the new] . . . promissory note evidencing the [l]oan."[18]

Like the 1975 Note and Mortgage, nothing in the December 1974 Loan Agreement, the prior promissory note given under that agreement, or the August 1975 Addendum in any way limited Baggen's repayment obligation to a particular source of funds.

3. The Trust Agreement Between Rainier and APC.

Contemporaneous with the execution of the 1975 Note, Mortgage and the August 1975 Addendum, Rainier and APC executed a trust agreement ("Trust Agreement"). Neither Baggen Tug & Barge Co., Inc., nor Samson Tug & Barge Co., Inc., was a party to this agreement. The Trust Agreement expressly recited that APC had loaned Samson Tug & Barge Co., Inc., $1,300,000 under the December 1974 Loan Agreement, the 1975 Note evidenced the terms of the loan, and the Mortgage was to secure the repayment of the loan.[19]

Nowhere did the Trust Agreement expressly recite that Baggen's repayment obligation was limited to a particular source of funds.

4. Baggen's Subsequent Performance and Default.

From 1975 until 1983, Baggen made timely payments under the terms of the 1975 Note and Mortgage. In 1982,

---

[18] Complaint, CR 1, Ex. 3 at 1.

[19] Appendix to Pet. at A-24 (reproduction of Trust Agreement, "Recitals" section, ¶¶ A, C).

APC terminated Baggen's towing services. Although Baggen claims to have stopped making payments on the Note when employment with APC terminated, Rainier's payment records reflect Baggen's last payment was on November 4, 1983, nearly one year after termination. When Baggen stopped making payments, Rainier's records reflected an outstanding balance of $665,241.04, and payments to that date totalling $1,606,290.66. Thus, at the time of default, Baggen had paid an amount equal to the loan principal of $1,300,000, plus over $300,000 in interest.

C. The Lower Court Proceedings.

1. Before the District Court.

On February 14, 1985, Rainier sued in admiralty, under 46 U.S.C. §§ 951 and 954(a) and 28 U.S.C. § 1333, to foreclose on the First Preferred Ship Mortgage, for an *in personam* money judgment in the event of any deficiency following a foreclosure sale, and for reasonable attorneys' fees and costs; all under the terms of the 1975 Note and Mortgage. Baggen's answer raised several affirmative defenses and counterclaims. On December 31, 1985, Rainier moved for summary judgment of foreclosure and dismissal of all defenses and counterclaims.

Baggen's opposition claimed Baggen had a prior oral "no interest" loan agreement with APC, and that Baggen had been compelled under duress to enter into a substitute written "with interest" loan; it was this supposed substitute that was reflected in the 1975 Note, Mortgage and related documents. Rainier disputed whether Baggen ever had such an oral "no interest" agreement with APC; Rainier also argued enforcing such an agreement would violate Washington State's

integrated agreement (*parol* evidence) rule and Statute of Frauds, which were invoked under the authority of the Note's choice-of-law clause.[20]

Baggen did not raise the issue now raised before this Court; Baggen only argued that Alaska, not Washington, law should apply, and that the alleged oral "no interest" agreement was enforceable under Alaska's integrated agreement rule and Statute of Frauds.[21]

On January 28, 1987, the Magistrate recommended Rainier's summary judgment motion be granted. Baggen objected, but raised no new issues. On April 1, 1987, the Magistrate reaffirmed his recommendation. On March 30, 1988, the District Court (Hon. Andrew J. Kleinfeld) accepted the Magistrate's recommendations, and entered an order granting Rainier's motion.

On July 7, 1988, the District Court entered a judgment decreeing foreclosure. On August 3, 1988, the court entered an order on that judgment directing the

---

[20] Rainier also challenged the appropriateness of permitting Baggen to pursue its claims against APC, without joining APC as a party. *See, e.g.*, Restatement (Second) of Trusts § 329 (trial court may refuse to permit defendant to use claims against the beneficiary as a setoff against trustee's claims, to avoid "circuity of action").

[21] The Petition claims Baggen "maintained that its maritime contract with APC was valid and enforceable under *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919)," but that the trial court nonetheless dismissed Baggen's claims, implying Baggen did raise the issue now raised before this Court. *See* Pet. at 7. In fact, Baggen did not raise before the district court the alleged conflict between general federal maritime law and Washington law now raised before this Court; Baggen did not even cite *Kossick* or *Union Fish Company* until its reply brief before the court of appeals.

GEORGEANN be sold, which it subsequently was. Baggen took no appeal within thirty days of either the decree or sale order; instead, Baggen waited until August 10, 1990, following entry of the district court's *in personam* money deficiency judgment on July 19, 1990, before filing a notice of appeal. Baggen's appeal, however, did not challenge the sale procedure or the adequacy of the sale price; Baggen sought only to vacate the summary judgment dismissal of Baggen's defenses and counterclaims, granted to Rainier under the decree of foreclosure and order of sale.

2. Before the Court of Appeals.

Baggen's opening brief did not raise the issues now raised before this Court; instead, Baggen continued to argue for Alaska law, and for the enforceability of the alleged prior oral "no interest" agreement under Alaska's integrated agreement rule and Statute of Frauds. Although Baggen's reply brief (for the first time in this case) argued that contrary state law may not displace general federal maritime law, Baggen still did not claim that Washington's integrated agreement rule was contrary to general federal maritime law; Baggen only asserted that Washington's Statute of Frauds was contrary to general federal maritime law, and therefore inapplicable to the alleged oral "no interest" agreement.[22]

On April 29, 1992, the Court of Appeals affirmed the District Court's summary judgment in an unpublished, *per curiam* memorandum order, subsequently reported at 962

---

[22] Also for the first time, Baggen's reply brief cited this Court's decisions in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919).

F.2d 14 (1992) (table). Rainier had challenged jurisdiction, arguing Baggen's failure to appeal within thirty days of the 1988 decree and sale order rendered Baggen's appeal untimely; the Ninth Circuit held Baggen's appeal timely, and affirmed on the merits. Baggen moved for reconsideration and suggested rehearing *en banc*. For the first time in this case, Baggen now argued Washington's integrated agreement rule was contrary to general federal maritime law.

The Ninth Circuit panel denied reconsideration. No active judge of the court having requested a vote on the suggestion of rehearing *en banc*, an order denying reconsideration and rehearing *en banc* was entered June 29, 1992.

II.
ARGUMENT

A. The Petition Presents No Important Question of General Federal Maritime Law Requiring This Court's Review.

Petitioners claim the Ninth Circuit's decision conflicts with this Court's decisions in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) ("*Kossick*") and *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919) ("*Union Fish*"). There is no conflict, for the following three reasons.

1. The Ninth Circuit Properly Enforced an Express Contractual Choice of Law.

Kossick and *Union Fish* involved attempts by vessel owners to use state Statutes of Frauds to avoid obligations under oral contracts with their seamen; this Court held such

statutes could not be used in that fashion. In *Kossick*, this Court held the New York Statute of Frauds could not defeat an oral agreement between a seaman and his employer, under which the employer would "assume responsibility for all consequences of improper or inadequate treatment" provided by a public hospital for a thyroid condition related to service on the employer's vessel. *See* 365 U.S. at 732-34. In *Union Fish*, this Court held the California Statute of Frauds could not defeat an oral agreement, under which an employer hired a party to serve as master of a vessel. *See* 248 U.S. at 311-12. Neither case, however, involved the application of a state integrated agreement rule, expressly and freely chosen by parties to a written contract, to refuse enforcement of an oral agreement collateral to the written contract.

It is a well established that parties may contract for the application of a particular state's law, *see, e.g.*, Restatement (Second) of Conflict of Laws § 187, and this principle has been applied to First Preferred Ship Mortgages. *See, e.g., Dietrich v. Key Bank, N.A.*, 693 F. Supp. 1112, 1115-16 (S.D. Fla. 1988); *see generally* S. Friedell, 2 *Benedict on Admiralty* § 70f at 6-63 & n.102, 6-64 & n.103 (6th ed. 1992) (discussing *Dietrich* and related cases). Baggen gave a note expressly providing for its "construc[tion] . . . and enforce[ment] according to the laws of the State of Washington," and the Ninth Circuit merely enforced that choice when it applied Washington's integrated agreement rule to defeat Baggen's collateral oral agreement

claim.[23] Nothing in *Kossick* or *United Fruit* suggests general federal maritime law is hostile to enforcing such contractual choices, particularly in a commercial transaction involving a written promissory note.[24]

2. The Ninth Circuit Properly Applied a State Law Rule That Is Consistent with the Comparable General Federal Maritime Rule.

Kossick and *United Fruit* involved an actual conflict between state law and general federal maritime law; there is no such conflict here. Baggen is attempting to avoid fulfilling a written unqualified promise to pay by proving -- through extrinsic (*parol*) evidence -- that in fact the promise was qualified, by the limitation that it need be met only through funds from a particular source (specifically, towing fees paid by APC for services rendered by Baggen using the GEORGEANN). It is hornbook law that such claims are barred by the integrated agreement rule, *e.g.*, J. Wigmore, 9 *Wigmore on Evidence* § 2444 (Chadbourn rev. 1981) at 148-49 (footnotes omitted), and Washington State courts have

---

[23] Baggen cites with approval the Ninth Circuit's statement of the integrated agreement rule in *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493 (9th Cir. 1988). *See* Pet. at 14. Yet, in *Kemp Fisheries* the Ninth Circuit enforced a choice of California law in a vessel charter agreement, and applied California's integrated agreement rule to defeat oral warranty and related claims outside the written charter agreement. *See* 852 F.2d at 495-96 (reversing district court).

[24] Although Rainier's discussion will focus on the integrated agreement rule, principally because it constitutes sufficient grounds for the Ninth Circuit's decision, Rainier believes that Washington's Statute of Frauds was also a correct basis for that decision, as the application of that statute (like Washington's integrated agreement rule) was the result of an express contractual choice.

repeatedly adhered to this well established principle. *See Meyer v. Armstrong*, 49 Wash. 2d 598, 304 P.2d 710, 711-12 (1956) (reversing judgment based on alleged oral agreement qualifying obligation to pay note by making it payable "only out of the selling price of [a] . . . mine or from the profits of its operation"); *Whitman Realty & Inv. Co. v. Day*, 161 Wash. 72, 296 P. 171, 172 (1931) (affirming dismissal of defense to note based on alleged oral agreement making note payable only "from dividends to be declared on [maker's] . . . stock," "sale of . . . [certain] securities," or "portion" of raise in salary); *Bank of California v. Starrett*, 110 Wash. 231, 188 P. 410, 411 (1920) (affirming refusal to entertain defense to note based on alleged oral agreement making note payable only from sale of the "pack" of a salmon packing business).

Baggen's claim thus flew in the face of a venerable *parol* evidence bar; the Ninth Circuit's decision did nothing more than enforce that rule. *See* Pet. at App. A-7 (Ninth Circuit Decision). Federal maritime law is not in conflict with such a result, as maritime contracts are subject to general principles of contract law, and admiralty recognizes the validity of the integrated agreement rule. *See, e.g.*, T. Schoenbaum, *Admiralty and Maritime Law* § 10-2 at 385 (3d ed. 1987) ("the federal maritime law includes general principles of contract law") (footnote omitted)); *Har-Win, Inc. v. Consolidated Grain & Barge Co.*, 794 F.2d 985, 987 (5th Cir. 1986) (federal admiralty law recognizes and enforces the integrated agreement rule). Nothing in *Kossick* or *United Fruit* suggests general federal maritime law should

now be construed to depart from these venerable contract law principles.

3. The Ninth Circuit Decision Does Not Concern a Contract Traditionally Within the Jurisdiction of the Admiralty Courts.

Kossick and *United Fruit* involved oral maritime contracts. Baggen's petition apparently assumes the Note and Mortgage, under which Rainier initiated this foreclosure proceeding, also constitute a maritime contract. Baggen is wrong; since this Court's decision in *People's Ferry Co. v. Beers*, 61 U.S. (20 How.) 393 (1858), contracts to build ships and related engagements have been held not to be maritime contracts. *See* S. Friedell, 1 *Benedict on Admiralty* § 186 at 12-30 (6th ed. 1992) (footnotes omitted) (citing and discussing *People's Ferry Co.* and progeny). In fact, the Ship Mortgage Act of 1920 was passed to remedy the debilitating effect of the *People's Ferry Company* doctrine on ship construction financing, by creating admiralty jurisdiction over foreclosures on mortgages that satisfied certain statutory requirements. *See Detroit Trust Co. v. Steamer THOMAS BARLUM*, 293 U.S. 21, 38-40 (1934); *see generally* S. Friedell, 2 *Benedict on Admiralty* § 69b at 6-21 through 6-23 (6th ed. 1992) (discussing the origins and purposes of the Act).

There is an undoubted federal interest in uniform administration of the Ship Mortgage Act. *See J. Ray McDermott & Co., Inc. v. Vessel MORNING STAR*, 457 F.2d 815, 817-18 (5th Cir.) (*en banc*), *cert. denied*, 409 U.S. 948 (1972). But that is a limited interest concerned principally with foreclosure procedure, and it should not

preclude parties to a First Preferred Ship Mortgage from contracting for the application of state law. The fact remains that First Preferred Ship Mortgages are not maritime contracts; state law therefore must be at least a principal source of the substantive rights of the parties to such arrangements, and this Court has repeatedly held admiralty courts should endeavor to determine issues in accordance with substantive state law, when admiralty is invoked to protect rights rooted in such law. *See, e.g., The TUNGUS v. Skovgaard*, 358 U.S. 588, 593 (1959) (citation omitted). In short, a decision to refuse enforcement of an oral agreement collateral to a First Preferred Ship Mortgage, because that agreement violates the integrated agreement rule of the state whose law the parties contractually selected, raises no issue under *Kossick* or *Union Fish*.

B. The Petition Does Not Properly Present the Issues Petitioners Ask This Court to Review.

Even if this Court were persuaded the issues Baggen raises are of the sort that might warrant this Court's review, the Petition should still be denied because it does not properly present those issues, for the following three reasons.

1. Petitioners Did Not Timely Raise the Issues They Now Raise Before This Court.

Baggen did not raise any form of its "conflicts with admiralty law" theory until its reply brief in the Ninth Circuit, and did not raise its present "integrated agreement rule conflicts with admiralty law" theory until its petition for rehearing and suggestion of rehearing *en banc*. Contrary to its present advocacy of a general federal maritime rule governing disposition of all collateral agreement claims in

admiralty, Baggen argued before the District Court for the application of Alaska's integrated agreement and Statute of Frauds law, evidently because Baggen believed it would prevail under that law.

Baggen's failure to raise any form of its present theory until the last phases of the court of appeals proceeding should foreclose review by this Court. Choice-of-law claims must be raised before the district court, if they are to be considered on appeal. *E.g., Babb v. Schmidt*, 496 F.2d 957, 960 (9th Cir. 1974). Grounds for reversing a judgment that are raised for the first time in a reply brief come too late for consideration. *E.g., Palmer v. Reconstruction Finance Corp.*, 164 F.2d 466, 468 (2d Cir. 1947) (op. per L. Hand, judge), *cert. denied sub nom. New York, N.H. & H.R. Co. v. RFC*, 334 U.S. 811 (1948). Grounds raised for the first time in a petition for rehearing are even more untimely. *See, e.g., U.S. v. Klotz*, 503 F.2d 1056 (8th Cir. 1974) (*per curiam*)) (failure to raise an issue until a petition for rehearing wrongfully deprives the opposing party of a right to reply); *Carr v. FTC*, 302 F.2d 688, 692 (1st Cir. 1962) ("vital" issues may not be raised for first time in a petition for rehearing) (both denying rehearing petitions). This Court will not consider issues that were not properly raised in the lower courts. *See, e.g., California v. Taylor*, 353 U.S. 553, 556 n.2 (1957). Because Baggen did not raise its present theory for relief until the petition for rehearing in the court of appeals, Baggen has not satisfied this Court's requirements for review of the issues raised by Baggen's petition for a writ of certiorari.

2. Petitioners' Present Theory Is Precluded by Its Proof Offered Below in Support of an Alternative and Factually Inconsistent Theory.

As stated, Baggen raised several affirmative defenses and counterclaims. One was the present claim that Baggen and APC had an oral "no interest" agreement that limited Baggen's repayment obligation to towing fees that APC paid Baggen. Alternatively, Baggen alleged that APC forced Baggen under duress to give up its oral "no interest" loan deal for the "with interest" written loan embodied in the Note, Mortgage and related instruments.

In the district court, Baggen elected to prove the duress claim; George Baggen, petitioners' president, testified APC took advantage of the companies' financial vulnerability, and compelled them under duress to consent to substituting the "with interest" agreement for the prior "no interest" deal.[25] Baggen's duress claim is a familiar one: a threat to breach a contract to force agreement to a substitute. *See generally* Anno., *Threat to Break a Contract as Duress*, 70 L. Ed. 822 (1926). Baggen, however, could not show the absence of an adequate legal remedy for the threatened breach, which is essential to establish this sort of duress claim. *See, e.g., Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948) (op. per L. Hand, Judge). The district court and the Ninth Circuit rejected Baggen's duress claim, and it has been abandoned before this Court.

---

[25] Affidavit of George Baggen, CR 78 at 7-8.

Baggen, however, cannot undo the consequences of its evidentiary election in the lower courts. *See, e.g., Baltimore & Ohio R.R. Co. v. Alpha Portland Cement Co.*, 218 F.2d 207, 211 (3d Cir. 1955) (a party cannot "shift" its evidentiary position, once taken before the district court); *see also U.S. for Use and Benefit of General Dynamics Corp. v. Home Indemnity Co.*, 489 F.2d 1004, 1007-08 (7th Cir. 1975) (criticizing attempt by party to "repudiate the evidentiary effects of letters and statements" introduced by that party at trial).[26] Baggen submitted evidence that it acquiesced in the substitution of the written "with interest" loan for the oral "without interest" one, and that evidence waives the factual predicate for Baggen's present claim that the parties entered into the First Preferred Ship Mortgage relationship with a continuing collateral arrangement that limited Baggen's obligation to pay to a specific source of funds. Without that factual predicate, Baggen's petition does not present a cognizable case or controversy raising the general federal maritime law issues which Baggen asks this Court to review.

3. Petitioner Did Not Timely Appeal From the Decree and Order of Sale.

As stated, Baggen filed its Notice of Appeal from the trial court's July 19, 1990, *in personam* money judgment. Baggen's quarrel, however, was not with that judgment; Baggen neither challenged the sale procedure, nor claimed it

---

[26] Rainier urged this ground for affirmance below, and therefore it is properly before this Court. *E.g., Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (citations omitted).

produced an inadequate price. What Baggen seeks is reversal of the trial court's July 7, 1988 judgment decreeing foreclosure and dismissing Baggen's defenses and counterclaims.

Since Chief Justice Marshall's opinion for the Court in *Ray v. Law*, 7 U.S. (3 Cranch) 179 (1805), foreclosures and related orders of sale have been held final and appealable immediately upon entry. *See, e.g., Citibank, N.A. v. Data Lease Financial Corporation*, 645 F.2d 333, 337-38 (5th Cir. 1981) (citing *First National Bank v. Shedd*, 121 U.S. 74 (1887); *Sage v. Central R.R.*, 93 U.S. 412 (1876); *Bronson v. LaCrosse & M.R.R.*, 67 U.S. (2 Black) 524 (1863); *Whiting v. Bank of the United States*, 38 U.S. (13 Pet.) 6 (1839)). Accordingly, Baggen could have taken an appeal no later than thirty days after entry of the August 3, 1988 order directing sale; Baggen's failure to do so precludes Baggen from now challenging the validity of the foreclosure decree dismissal of Baggen's defenses and counterclaims. *See, e.g., Data Leasing*, 645 F.2d at 337-38.[27] As Baggen sought no relief on appeal besides vacation of the foreclosure decree judgment, Baggen's appeal should have been dismissed for failure to comply with the jurisdictional requirements of Federal Rule of Appellate Procedure 4(a), *see, e.g., Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 264 (1978), and Baggen's petition therefore also fails to timely present the issues it asks this Court to review.

---

[27] Rainier also urged this ground for affirmance below and therefore it is properly before this Court, even though the Ninth Circuit ruled Baggen's appeal timely. *E.g., Blum v. Bacon*, 457 U.S. at 137 n.5 (citations omitted).

III.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.[28]

RESPECTFULLY SUBMITTED,

James Brian Stoetzer
Counsel of Record
Michael B. King
Katherine Riffle Roper
Lane Powell Spears Lubersky
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
(206) 223-7000
Counsel for Respondent
Rainier National Bank

---

[28] Rainier has been awarded attorney fees in the District Court and the Ninth Circuit, under a fees clause in the Note. It is Rainier's understanding, based on a review of the rules, leading secondary authorities and a discussion with the Clerk of this Court, that an application for an award of fees incurred in opposing Baggen's petition should be made to the Ninth Circuit.